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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1069

GREAT LAKES DREDGE & DOCK COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS, AND BRIEF IN SUPPORT THEREOF.

WILLIAM S. HAMMERS,
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THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Great Lakes Dredge & Dock Company, by William S. Hammers, its counsel, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause on January 7, 1946.

Opinion Below

The opinion of the Court of Claims (R. 34-39) is not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered on January 7, 1946 (R. 39). The jurisdiction of this Court

is invoked under Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. part 2, 752.

Contract Provisions Involved

The case involves two provisions of the specifications which were made a part of the contract, to-wit:

> 1-08. *Physical Data.* * * * Owing to the rapid currents the material in the dredged cuts is eroded when it is disturbed by the process of dredging. During the progress of recent contracts the prescribed cuts have been secured by the contractor after the removal of about 75 percent of the estimated quantity of material in the cut, scow measurement, including overdepth. The quantities of materials given in the specifications, are the estimated pay yardages and are 75 percent of the estimated quantities, scow measurement, that must be removed from the cuts.
>
> 4-03. Overdepth and Side Slopes. * * *
>
> * * * * * * *
>
> The contracting officer will prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredge cut, and material actually removed on his order from the prescribed overcuts, whether dredged in original position, or after having fallen into the cut, will be estimated and paid for. Material taken from beyond the limits as extended in this paragraph will be deducted from the total amount dredged as excessive overdepth dredging or excessive side-slope dredging and will not be paid for.

Summary Statement of the Matter Involved

The suit grows out of a contract dated June 6, 1936, between petitioner and the United States for performing certain dredging work in the Cape Cod Canal and in Hog

Island Channel in Buzzards Bay, Massachusetts, including the dredging of a channel leading into Onset Bay. (R. 11)

The work was commenced on July 1, 1936, and completed on August 16, 1938. (R. 11)

On the monthly estimates of the quantity of material for which petitioner was entitled to receive payment, the contracting officer deducted a total of 443,393 cubic yards, scow measurement, at the contract unit price of 34.25¢ per cubic yard, on the premise that, under paragraph 4-03 of the specifications, above set out, 258,005 cubic yards thereof consisted of excessive side-slope dredging, and 185,388 cubic yards consisted of excessive overdepth dredging, that is, material taken from beyond the contract limits as extended by the aforesaid paragraph of the specifications. (R. 26)

The suit was instituted to recover the sum of $151,862.11 as the balance due petitioner under the contract for the dredging and disposal of the aforesaid 443,393 cubic yards, scow measurement, of material at the contract unit price of 34.35¢ per cubic yard. (R. 8-9, 34)

The estimated yardage to be removed above the required depth was 4,135,700 cubic yards, scow measurement, and the maximum amount of allowable overdepth dredging was estimated at 807,200 cubic yards, scow measurement. (R. 11) It was stated in paragraph 1-08 of the specifications, above set out, that the quantities of materials given in the specifications were the estimated pay yardages, or 75% of the estimated quantities, scow measurement, that must be removed from the cuts, attention being invited to the fact that during the progress of recent contracts it had been found that the rapid currents eroded and carried away 25% of the material.

The specifications required that the channel leading into Onset Bay be dredged to a depth of 17 feet over a

bottom width of 100 feet, and in Cape Cod Canal and Hog Island Channel to a depth of 32 feet over a bottom width of 315 feet. (R. 34) As to the sides, or side slopes, no reference was made to dredging, other than as indicated in paragraph 4-03 above, but the contract drawings had indicated thereon permissible side-slopes of 1 foot vertical to 2½ feet horizontal, the material lying above such slope lines being included in the total quantity of estimated pay yardage available for removal. (R. 11-12, 34)

Paragraph 2-01 of the specifications (R. 12) provided that the location and limits of the work to be done would be plainly indicated by the contracting officer or his agents by stakes and ranges, and that was done, the dredging operations in the side cuts being kept far enough inside the area limits to prevent digging beyond the specified limit lines. (Findings 22, R. 29, and 26, R. 31)

The contracting officer did not prescribe any overcuts to be made to prevent the encroachment of material from the sides (R. 37) but did nevertheless deduct as excessive side-slope dredging the 258,005 cubic yards of material that slid or fell into the channel and was removed by the dredge or the currents.

The quantity of material to be deducted as excessive dredging was determined in place measurement by surveys of the bottom and sides of the channel and converted into scow measurement in the ratio provided in the specifications for such purpose, but without any adjustment being made for the 25% removal attributable to erosion and the rapid currents.

The court below held petitioner not entitled to the relief sought and dismissed the petition.

Questions Presented

1. Whether the failure on the part of the contracting officer to prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredged cut, as provided in paragraph 4-03 of the contract specifications, constitutes a breach of the contract?

2. In the absence of any prescription on the part of the contracting officer for the dredging of overcuts to prevent the encroachment of material from the sides, is petitioner properly chargeable with any deduction for excessive side-slope dredging?

3. Where the work is performed within the limits of the stakes and ranges set by the contracting officer or his agents and within the bottom limits of the prescribed area, is petitioner properly chargeable with excessive side-slope dredging for any material that encroached on the channel and was removed by dredging or by erosion and current action?

4. Whether respondent erred in not reducing the determined quantity of excessive overdepth dredging by 25% to eliminate that which was not dredged and placed in the scows for measurement and payment but by the known factor of erosion and current action?

Reasons for Granting the Writ

Petitioner respectfully represents, as reasons for granting the writ, that the Court of Claims has in this case decided important federal questions of law in a way probably in conflict with applicable decisions of this Court; and has so far departed from the accepted and usual course of judicial interpretation of such questions with respect to government contracts as to call for an exercise of this court's power of supervision.

Conclusion

For the reasons stated herein it is respectfully submitted that this petition for a writ of certiorari should be granted and the decision of the Court of Claims reviewed.

William S. Hammers,
Counsel for Petitioner,
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Washington 5, D. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1069

GREAT LAKES DREDGE & DOCK COMPANY,
Petitioner,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

The special findings of fact and opinion of the Court of Claims is set forth in the accompanying transcript of the record, pages 10 to 39, inclusive.

Jurisdiction

The judgment below was entered January 7, 1946. (R. 39) The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. part 2, 752.

Contract Provisions Involved

The provisions involved are paragraphs 1-08 and 4-03 of the contract specifications. They are set forth in the petition for the writ and in the transcript of the record (R. 12-13) and are therefore not reproduced herein, this brief being attached to the petition.

Statement of the Case

The suit, as indicated in the petition, grows out of a contract between petitioner and the United States for performing certain dredging work in the Cape Cod Canal and in Hog Island Channel in Buzzards Bay, Massachusetts, including the dredging of a channel leading into Onset Bay. (R. 11)

On the monthly estimates of the quantity of material for which petitioner was entitled to receive payment, the contracting officer deducted, at the contract unit price of 34.25¢ per cubic yard, scow measurement, 258,005 cubic yards of material as excessive side-slope dredging, and 185,388 cubic yards as excessive overdepth dredging.

The contract provision controlling the situation in regard to such deductions is found in paragraph 4-03 of the specifications. (R. 13)

Under the plans and specifications, the petitioner was required to dredge the channel leading into Onset Bay to a depth of 17 feet over a bottom width of 100 feet; and in the Cape Cod Canal and Hog Island Channel in Buzzards Bay it was required to dredge the channel to a depth of 32 feet over a bottom width of 315 feet. (R. 34)

Paragraph 4-03 authorized the dredging to be carried down an additional three feet; and further provided that the contracting officer would prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredged cut.

The specifications made no provision for side slope dredging, but the drawings had indicated thereon a side slope line of 1 foot vertical to 2½ feet horizontal, and the total estimated quantity of material stated in the specifications as likely to be removed within the specified limits included the material lying above the aforesaid side slope line. The side slope line shown on the drawings represented the natural slope that it was assumed the material would take as a result of the dredging required in the channel.

The contracting officer did not prescribe any overcuts to be made to prevent the encroachment of material from the sides of the channel (R. 37) and it is the contention of petitioner that his failure to do so constituted a breach of the contract, and that it is therefore entitled to receive payment for the 258,005 cubic yards of material that was dredged within the limits of the specified area which was deducted as excessive side-slope dredging.

In the specifications (par. 1-08) it was stated that during the progress of recent contracts the prescribed cuts had been secured by the contractor after the removal of about 75% of the estimated quantity of material in the cut, scow measurement, including overdepth, and indicated that the other 25% had been removed by erosion and the rapid currents. (R. 12) However, in making the deductions for excessive overdepth and side-slope dredging no reduction in the quantity was made for the 25% of material removed by the rapid currents.

The situation, therefore, resolves itself into a matter of the proper interpretation to be placed upon the two provisions of the specifications hereinbefore mentioned.

Specification of Errors to Be Urged

Petitioner contends that the Court of Claims erred in the following respects:

1. In holding that paragraph 4-03 of the specifications does not make it mandatory upon the contracting officer to prescribe any particular overcut.

2. In holding that even though paragraph 4-03 does make it mandatory upon the contracting officer to prescribe some overcut, petitioner is unable to show how much of the deduction was due to his failure to prescribe any.

3. In holding that petitioner was no tentitled to an adjustment of 25% for the erosion factor in the determination of the quantity of material to be deducted as excessive overdepth dredging.

ARGUMENT

I

Petitioner's Right to Reimbursement for the Material Deducted as Excessive Side-slope Dredging

In the case of *Hollerbach* v. *United States*, 233 U. S. 165, 171, this court promulgated or stated the following rule in regard to the interpretation of government contracts which has been applied to many cases and is believed to be applicable in this instance, to-wit:

> A government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument.

Another familiar rule of construction is that where a contract is prepared in one of the government departments,

leaving the contractor no choice as to form or phraseology, it must, where the wording gives rise to doubt, be construed against the government and favorably to the contractor. *Moore* v. *United States*, 196 U. S. 157; *Noonan* v. *Bradley*, 9 Wall. 394; *Garrison* v. *United States*, 7 Wall. 688.

The provision in paragraph 4-03 of the specifications for the prescribing of overcuts to be made to prevent the encroachment of material from the sides forms a material part of the contract and has an important bearing on the work. It must, therefore, be given effect, and a sensible meaning applied to it. *Burdon Central Sugar Refining Co.* v. *Payne*, 167 U. S. 127; *Clark* v. *United States*, 6 Wall. 543. The purpose is obvious, namely, to prevent the encroachment of material from the sides of the dredged cut, and it so states.

The evidence shows, as found by the Court of Claims (finding 18, R. 26-27), that the areas to be dredged were laid out by the government engineers in cuts, and marked by stakes and ranges, as required by paragraph 2-01; that petitioner in its dredging operations along the sides dredged within the limits of the range on the stakes fixed by the government engineers for its guidance (finding 26, R. 31); and that in dredging the side cuts the dredge was kept far enough inside of the area lines to prevent any digging beyond the specified limit lines (finding 22, R. 29). Moreover, the court found as a fact (R. 29) that all of the side slope material dredged and removed by petitioner was dredged within the limits indicated by the stakes and ranges.

The depicting of side slope lines on the drawings was understood to be for the purpose of obtaining uniformity in bids. It was known that material from the sides would fall or slide into the channel as the work was being performed and would have to be taken into account in the preparation of a bid; therefore, there was included in the

estimated quantity of pay yardage on which the bids were to be based the material lying above the line representing the natural slope that it was assumed the material would take as a result of the dredging required in the channel.

The petitioner was not obliged to assume that the material in the banks would take the slope indicated, but was obliged and required to dredge and redredge the bottom of the channel until there had been obtained the required width and depth below mean low water regardless of how much side slope material came into the channel during the process. It had the assurance of respondent, as set out in paragraph 4-03 of the specifications, that the contracting officer would prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredged cut, certainly any in excess of that lying above the indicated slope line which was included in the quantity of estimated pay yardage likely to be removed within the specified limits. The contracting officer, however, did not see fit to comply with the contract requirement for overcuts.

The failure of Government officials to observe express contractual obligations has been held to constitute a breach of the contract subjecting the Government to a suit for the recovery of damages. *Barlow* v. *United States,* 82 C. Cls. 360.

II

Petitioner's Right to a Correction of the Deductions to Exclude Known Erosion

It was a known fact, determined from experience in the performance of previous contracts for dredging in Cape Cod Canal that erosion and the rapid currents caused a loss or removal of 25% of the material when disturbed by the process of dredging. It was referred to in the specifications (par. 1-08, R. 12) and prospective bidders were informed that the estimated quantity of material likely to be removed

by dredging was the estimated pay yardages only, or 75% of the material actually within the area.

Under paragraph 4-04 of the specifications (R. 13) the material removed was to be measured by the cubic yard in scows at the dredge. Obviously material removed by erosion and the currents did not reach the scows for measurement and payment.

The deduction for excessive overdepth dredging or excessive side-slope dredging is limited to material "taken" from beyond the contract limits. Certainly the reference to material taken must be to that which was removed by the dredge and placed in the scows to be measured for payment. A single cut through the Canal could start erosion that might result in the removal of many thousands of yards of the material by the rapid currents.

The lower court's interpretation that the engineer's computation of the quantity of material to be deducted did not require correction to eliminate the 25% erosion factor appears to conflict with the finding of this court in the case of *Clark* v. *United States,* 6 Wall. 543; and with its own decisions in *Barlow* v. *United States,* 35 C. Cls. 514, and *Collins* v. *United States,* 34 C. Cls. 294, 332.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the Court of Claims ruling in regard to the two matters herein referred to by petitioner.

Respectfully submitted,

WILLIAM S. HAMMERS,
Counsel for Petitioner.

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CHARLES ELMORE CROPLEY
CLERK

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 34–39) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 7, 1946 (R. 39). Petitioner's motion for a new trial was overruled on January 7, 1946 (R. 10). The petition for a writ of certiorari was filed on April 6, 1946. The jurisdiction of this Court is invoked under Section 3 (b)

of the Act of February 13, 1925, as amended by the Act of May 12, 1939.

QUESTION PRESENTED

Whether the specifications in petitioner's dredging contract with the United States entitled petitioner to payment for certain excessive overdepth and side-slope dredging.

CONTRACT SPECIFICATIONS INVOLVED

The specifications of petitioner's contract with the United States provide, in part, as follows (R. 12–13):

> 1–08. *Physical Data.*—* * * Owing to the rapid currents the material in the dredged cuts is eroded when it is disturbed by the process of dredging. During the progress of recent contracts the prescribed cuts have been secured by the contractor after the removal of about 75 percent of the estimated quantity of material in the cut, scow measurement, including overdepth. The quantities of materials given in the specifications, are the estimated pay yardages and are 75 percent of the estimated quantities, scow measurement, that must be removed from the cuts.
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> * * * * *
>
> 4–03. *Overdepth and Side Slopes.*—To cover inaccuracies of the dredging process, material actually removed within the specific areas to be dredged to a depth of not more than 3 feet below the required depth

will be estimated and paid for at full contract price.

The contracting officer will prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredged cut, and material actually removed on his order from the prescribed overcuts, whether dredged in original position, or after having fallen into the cut, will be estimated and paid for. Material taken from beyond the limits as extended in this paragraph will be deducted from the total amount dredged as *excessive overdepth dredgin* [sic] *or excessive side-slope dredging* and will not be paid for.

STATEMENT

The facts, as found by the Court of Claims, may be summarized as follows: By a contract of June 6, 1936, with the United States, petitioner undertook certain dredging work in Cape Cod Canal, in Hog Island Channel in Buzzards Bay, Massachusetts, and in a channel leading to Onset Bay (Fdg. 1, R. 10–11). The specifications called for dredging of the Onset Bay Channel to a depth of 17 feet over a bottom width of 100 feet, and dredging of Cape Cod Canal and Hog Island Channel to a depth of 32 feet over a bottom width of 315 feet (Fdg. 4, R. 11–12). The specifications allowed an excessive depth of three feet, in each case at the full contract price, to cover inaccuracies in the dredging process (Fdg. 5, R. 13). The plans showed permissible side slopes of one

foot vertical to two and one-half feet horizontal, and material removed up to these side slopes was to be paid for (Fdg. 4, R. 12). It was further provided in the specifications (Par. 4–03, R. 13) that:

> The contracting officer will prescribe the overcuts[1] to be made to prevent the encroachment of material from the sides of the dredge cut, and material actually removed on his order from the prescribed overcuts, whether dredged in original position, or after having fallen into the cut, will be estimated and paid for. Material taken from beyond the limits as extended in this paragraph will be deducted from the total amount dredged as *excessive overdepth dredgin* [sic] *or excessive side-slope dredging* and will not be paid for.

The contract price (with exceptions not here relevant) was 34.25¢ per cubic yard of material removed (Fdg. 2, R. 11). Such material was to be measured in scows at the dredge, and when necessary for any cause to convert "scow measurement" into "place measurement" or the reverse, 115 yards of the former was to be the equivalent of 100 yards of the latter (Fdg. 5, R. 13). The location and limits of the work to be done were to be indicated by the contracting officer or his agents, by stakes and ranges, or otherwise (Fdg. 5, R. 12). Whether or not contract depth was being made was to be determined

[1] *i. e.*, additional cuts.

by soundings and sweepings taken behind the dredge as the work progressed; and if this survey disclosed any excess of overdepth or side-slope dredging, the excess was to be deducted from the monthly estimates of excavated material upon which monthly payments were to be made to petitioner (Fdg. 5, R. 13). The specifications (Par. 1-08) warned that "owing to the rapid currents the material in the dredged cuts is eroded when it is disturbed by the process of dredging", and that "during the progress of recent contracts the prescribed cuts have been secured by the contractor after the removal of about 75 percent of the estimated quantity of material in the cut, scow measurement, including overdepth" (Fdg. 5, R. 12).

Work was commenced by petitioner on July 1, 1936 (Fdg. 3, R. 11). Government engineers marked out by stakes and ranges the areas to be dredged (Fdg. 18, R. 26-27). In the Onset Channel, the side ranges were set at the outer contract limit line; in Cape Cod Canal and Hog Island Channel they were set 5 feet (later 7½ feet) inside the outer contract limit line (Fdg. 18, R. 26-27). No overcuts were prescribed by the contracting officer (R. 37). Notwithstanding petitioner's knowledge that erosion was considerable in the contract area (Fdg. 26, R. 31), petitioner dredged immediately up to the limits of the range on the stakes fixed by the Government engineers (Fdg. 26, R. 31), and uniformly

dredged, not merely to the required 17 and 32 foot depths, but to the maximum allowable overdepth, the dredge on many occasions going considerably beyond such depth (Fdg. 24, R. 30). All of the material removed was dredged within the limits indicated by the stakes and ranges (Fdg. 22, R. 29). During the dredging on the side slope, a large amount of material loosened by the dredge fell to the bottom, and the dredging operation also caused a large amount of the loose sandy material to erode, much of it being carried away by the current and some being deposited on the bottom (Fdg. 26, R. 31). Both erosion and fill continually took place in the canal, principally during the process of dredging. In some places where petitioner dredged beyond the pay limits, the excavated area would fill up when the tide changed, whereas at other places erosion would occur (Fdg. 29, R. 32–33).

Upon completion of the work on August 16, 1938, it was found (by surveys and place measurement converted to scow measurement) that there had been excessive side-slope dredging of 258,005 cubic yards and excessive overdepth dredging of 185,388 cubic yards, or a total excess of 443,393 cubic yards (Fdgs. 16 and 17, R. 26). Over petitioner's objection, this total was deducted by the contracting officer from the material placed in the scows, and his decision in this regard was sustained by both the Chief of

Engineers, and the Comptroller General (Fdgs. 8–15, 30; R. 14–26, 33).[2]

Thereupon, on February 12, 1942, petitioner instituted this suit in the Court of Claims to recover $151,862.11 for the 443,393 cubic yards in question, on the grounds that (1) the contracting officer had failed to prescribe overcuts to prevent encroachment of material from the sides of the dredged cut, (2) the sounding surveys for determining the progress of the dredging allegedly were unduly delayed, and (3) the deduction for excessive overdepth and side-slope dredging should have been reduced by 25% to eliminate material removed by erosion (R. 1–9, 34).[3] At the trial, petitioner claimed but failed to establish that the excess areas for which deductions were made for excess overdepth dredging were chiefly areas resulting from erosion (Fdg. 28, R. 32). There was no showing what part, if any, of the areas outside the contract limits on the bottom of the canal for which excess dredging

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[2] The rulings of the contracting officer and the Chief of Engineers had been made during the course of the work, when petitioner, on several occasions, had objected to deductions for excessive yardage made from the monthly estimates of material removed (Fdgs. 6–15, R. 14–26).

[3] In the petition filed herein, petitioner does not raise and apparently has abandoned the contentions made below that the sounding surveys were unduly delayed, and that deductions for excessive side-slope dredging (as opposed to excessive overdepth dredging) should be reduced by 25 percent to compensate for erosion (Pet. 5, 10).

was deducted should be attributed to erosion; but the evidence showed that areas in which the Government had determined that material was removed by erosion were excluded in making deductions for excessive dredging (Fdg. 28, R. 32). At the conclusion of the trial, the Court of Claims made findings of fact, and concluded as a matter of law that petitioner's complaint should be dismissed (R. 10–34).

ARGUMENT

The Court of Claims was clearly correct in dismissing petitioner's complaint, and its decision (which accords with the uniform ruling of the contracting officer, the Chief of Engineers, and the Comptroller General) presents no question of importance warranting review by this Court.

1. There is clearly no merit in petitioner's contention (Pet. 10) that it was "entitled to an adjustment of 25% for the erosion factor" in determining the amount of material to be deducted as excessive overdepth dredging. Were it not for petitioner's flagrant abuse of the 3 foot overdepth allowance, no overdepth problem would have arisen. The express purpose of the allowance was "to cover inaccuracies of the dredging process" (R. 13). Recognizing that the contractor would sometimes go below the desired contract depth in order to achieve that depth, the Government undertook to pay for the yardage

removed in the additional 3 foot area. From the start, however, petitioner viewed the overdepth allowance not as a tolerance, but as a means of swelling its return on the contract, and deliberately dredged to the maximum overdepth dredging limits. As the court below observed (R. 36): "If [petitioner] had followed the spirit of the contract and had not intentionally dredged below the depth of 32 feet, it is not unreasonable to assume that erosion would not have removed material below the 35-foot level, and no deduction would have been made from scow measurement for materials removed by erosion from below this level."

Petitioner's claim for an erosion adjustment on the overdepth deduction is otherwise ill-founded. The simple fact is that petitioner has failed to prove what effect erosion had upon the work. The Court of Claims expressly found that the evidence did not support petitioner's contention that the areas for which deductions were made for excess overdepth dredging were chiefly areas resulting from erosion (Fdg. 28, R. 32). The court further found that while there was erosion in the bottom, there was no proof showing what part, if any, of the areas outside the contract limits on the bottom of the canal should be attributed to erosion (Fdg. 28, R. 32). Moreover in areas where the Government determined that material was removed by erosion, no deductions were made for excess dredging (Fdg. 28, R.

32). In these circumstances, petitioner, as a matter of proof, has failed to make out a case for an erosion adjustment.

2. There is equally no merit to petitioner's contention (Pet. 10–12) that the contracting officer was under a duty to prescribe over-cuts and that his failure to do so entitled petitioner to payment for all the side-slope dredging without regard to the side slope specified in the contract. The contract carefully prescribed the desired depths, the overdepth tolerance, and the permissible side slope. While it provided that "The contracting officer will prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredged cut", and that "material actually removed on his order from the prescribed overcuts, whether dredged in original position, or after having fallen into the cut, will be estimated and paid for" (Specifications, par. 4–03; R. 13), it warned in the same paragraph, that "Material taken from beyond the limits as extended in this paragraph will be deducted from the total amount dredged as *excessive overdepth dredging* [sic] *or excessive side-slope dredging* and will not be paid for" (Italics in original). Since no overcuts were prescribed by the contracting officer, the Government properly refused to pay petitioner for anything beyond the side-slope specified in the contract.[4] As the court below pointed out (R. 38),

[4] During the course of the work on the Onset Channel, the Government's resident engineer allowed payment for 22,000

it was not "mandatory upon the contracting officer to prescribe any particular overcut"; he "might have prescribed an overcut of 10 feet, of 5 feet, of 3 feet, of 1 foot, or 6 inches, or none at all, depending upon what he thought was necessary under the circumstances." Since petitioner consistently dredged to the maximum overdepth allowance rather than to the desired depth, the contracting officer no doubt concluded that whatever material slid from the banks would not fill up the bottom of the cut beyond the desired depth, and hence that there was no necessity to prescribe any overcuts. Moreover, even if the contracting officer was under a duty to prescribe some overcut, breach of that duty still would not entitle petitioner to recover, for petitioner cannot show to what extent the excess is attributable to breach of that duty. In any event, the excessive side-slope dredging, like the excessive overdepth dredging, undoubtedly had its roots in petitioner's abuse of the overdepth allowance. Although petitioner dug within the range on the stakes fixed by the Government's engineers, its deliberate adherence to the maximum overdepth allowance undoubtedly caused a much larger amount of material to fall from the slopes than would otherwise have been the case.

3. The instant proceeding presents no questions of importance for determination by this Court.

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cubic yards of excessive side-slope dredging, other than that here involved. The contracting officer then ruled this payment improper, and proposed to make a deduction therefor, but no deduction was ever made (Fdg. 27, R. 31–32).

The particular controversy here involved stems primarily from a concurrence of two peculiar factual situations, namely the unusually strong current in the dredging area, and the decision of the petitioner to use the maximum allowable overdepth as its goal, rather than as a tolerance to compensate for errors in the dredging operation.

CONCLUSION

The decision below is clearly correct and there is no conflict.[5] It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1946.

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[5] With respect to its claim for a 25% erosion allowance, petitioner asserts that there is a conflict between the decision below and the decisions in *Clark* v. *United States*, 6 Wall. 543; *Barlow* v. *United States*, 35 C. Cls. 514, and *Collins* v. *United States*, 34 C. Cls. 294, 332. Examination of these cases, however, discloses that none of them deals with dredging contracts or announces principles inconsistent with the decision below.

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